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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

DOCKETED

JAN 17 2017

DOCKETED BY

COMMISSIONERS

TOM FORESE - Chairman  
BOB BURNS  
DOUG LITTLE  
ANDY TOBIN  
BOYD DUNN

In the matter of:

Robert J. Moss and Jennifer L. Moss, husband  
and wife,

The Fortitude Foundation, an Arizona  
corporation,

Ventures 7000, LLC, an Oklahoma limited  
liability company,

Jeffrey D. McHatton and Starla T. McHatton,  
husband and wife,

Robert D. Sproat and Jane Doe Sproat,  
husband and wife,

Kevin Krause and Jane Doe Krause, husband  
and wife, and

Vernon R. Twyman, Jr., a single man,

Respondents.

DOCKET NO. S-20953A-16-0061

**MOTION FOR ORDER  
ALLOWING TELPHONIC  
TESTIMONY**

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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests leave to present the telephonic testimony of the following witnesses during the hearing in the above-referenced matter:

- Lowell Olmstead, a resident of Jupiter, Florida;
- Nelson Billy, a resident of Window Rock, Arizona;
- David or Cindy Desisto, residents of Green Valley, Arizona;
- Marques Flores, a resident of Tucson, Arizona; and

- Dolf de Roos, Ph.D, a Phoenix resident who regularly travels internationally for business.

Each prospective witness possesses knowledge relevant to matters in dispute. Requiring these witnesses to travel and appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting these prospective witnesses to appear and give testimony telephonically solves this problem while facilitating the introduction of relevant evidence and a full opportunity for questioning by all parties. Accordingly, good cause exists for granting such leave and doing so would not infringe upon the Respondents' procedural due process rights. For these reasons, which are more thoroughly addressed in the following Memorandum of Points and Authorities, this motion should be granted.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. Facts**

The Division anticipates calling the witnesses listed above as central witnesses during the hearing in this matter. With the exception of Dr. de Roos, they are all investors who purchased the promissory notes and investment contracts at issue. These investor witnesses all had communications with Respondents Robert Moss, The Fortitude Foundation, Jeffrey McHatton, Robert Sproat and/or Kevin Krause regarding their investments. They can provide probative testimony that supports a number of the allegations in the Amended Notice, including Respondents' offer and sale of the securities at issue and what Messrs. Moss, McHatton, Sproat and/or Krause said and did not say in connection with those sales.

Dr. de Roos is not an investor but has relevant information about Respondents' purported low alpha lead and gold recovery projects alleged in the Amended Notice. Although Dr. de Roos resides in Phoenix, he may be traveling internationally during the scheduled hearing dates.

1 The burden of having these witnesses provide testimony in person is impractical. Mr.  
2 Olmstead would have to travel from Florida. Mr. Billy would have to travel 283 miles from  
3 Window Rock. Mr. Flores and the Desistos would have to travel at least 115 miles from  
4 Tucson and Green Valley, respectively.

5 The simple and well-recognized solution to this problem is to permit these witnesses  
6 to testify telephonically. Through this manner, not only will relevant evidence be preserved  
7 and introduced, but all parties will have a full opportunity for questioning, whether by direct  
8 or cross-examination of these witnesses.

## 9 **II. Argument**

### 10 **A. Good cause exists for permitting telephonic testimony.**

11 “When considering telephonic testimony, the initial inquiry should be whether good  
12 cause has been shown for its use.” *In re HM-2008-000867*, 225 Ariz. 178, 182, 236 P.3d  
13 405, 409 (2010). “In determining whether good cause has been demonstrated, the court may  
14 consider whether the hearing can conveniently be continued to allow in-person testimony.”  
15 *In re HM*, 225 Ariz. at 181 n.4, 236 P.3d at 408 n.4. “It may also consider the costs of  
16 bringing experts or other witnesses to court....” *Id.*

17 In the instant case, the investor witnesses listed above possess relevant knowledge of  
18 the offer and sale of the investments at issue, Respondents’ communications with them about  
19 the investments, and related documents, but, because they reside long distances from  
20 Phoenix, they are practically unavailable for in-person testimony. The cost of bringing the  
21 witnesses to Phoenix would be prohibitively expensive for the Division. Moreover, the  
22 Division anticipates they would testify under direct examination for less than one hour each.  
23 Continuing the hearing date would do nothing to alleviate the significant inconvenience to  
24 the witnesses and the prohibitive expense to the Division of having them travel to Phoenix  
25 to testify in person.

1 It is more practical to allow these witnesses to testify telephonically during the  
2 Division's case in chief given that the Division's other witnesses have made themselves  
3 available for the current hearing dates. Permitting the witnesses to appear telephonically  
4 would greatly reduce the burden on both the witnesses and the Division of presenting their  
5 testimony.

6 Therefore, good cause exists for permitting the witnesses listed above to testify by  
7 telephone.

8  
9 **B. Permitting telephonic testimony does not infringe upon the Respondents'**  
10 **procedural due process rights and is within the Commission's administrative**  
11 **rules and practice.**

12 Upon finding good cause for using telephonic testimony, consideration should be  
13 given to "whether admission of telephonic testimony comported with due process." *In re*  
14 *HM*, 225 Ariz. at 182, 236 P.3d at 409. What constitutes due process "is not a technical  
15 conception with a fixed content unrelated to time, place and circumstances," but, rather, takes  
16 into account "such procedural protections as the particular situation demands." *Mathews v.*  
17 *Eldridge*, 424 U.S. 319, 334 (1976) (internal quotations omitted). In a civil administrative  
18 proceeding, procedural due process requires balancing: (1) the individual's interests; (2)  
19 government's interests; and (3) the "likely impact of telephonic testimony on the accuracy  
20 and fairness of the process." *In re HM*, 225 Ariz. at 182, 236 P.3d at 409.

21 These competing interests are protected by procedural safeguards inherent in  
22 telephonic testimony. Individuals have an interest in due process, property and liberty.  
23 Government interests typically include, among other things, protecting the public from harm  
24 (*id.*) and in "conserving fiscal and administrative resources." *Mathews*, 424 U.S. at 347-48.  
25 Witnesses appearing by telephone are subject to cross examination. *In re HM*, 225 Ariz. at  
26 182, 236 P.3d at 409. Moreover, telephonic testimony "preserves paralinguistic features  
such as pitch, intonation, and pauses that may assist an ALJ in making determinations of

1 credibility.” *T.W.M. Custom Framing v. Indus. Comm’n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d  
2 745, 752 (App. 2000). At the same time, appearing telephonically preserves state resources  
3 that would otherwise have to be spent on travel and accommodations. Accordingly,  
4 telephonic testimony “does not significantly increase the risks of an erroneous deprivation.”  
5 *In re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

6 Permitting telephonic testimony would have minimal negative impact on the accuracy  
7 and fairness of the evidentiary process. The witnesses at issue, though appearing by  
8 telephone, would be still be subject to cross examination by the Respondents and the  
9 Administrative Law Judge could still make determinations of credibility based the manner  
10 in which the witnesses testify. Furthermore, permitting telephonic testimony would enable  
11 the Division to present evidence that furthers the Commission’s interests in protecting the  
12 public from the harm allegedly committed by the Respondents and in conserving its financial  
13 and administrative resources. Therefore, permitting the above witnesses to testify by  
14 telephone does not infringe upon the Respondents’ procedural due process rights.

15 In addition, the Commission’s Rules of Practice and Procedure are intended to “be  
16 liberally construed to secure just and speedy determination of all matters presented to the  
17 Commission.” *See* A.A.C. R14-3-101(B). They encompass the use of other forms of  
18 testimony during administrative hearings. More specifically, Rule R14-3-109 states, “In  
19 conducting any investigation, inquiry, or *hearing*, neither the Commission, nor any officer  
20 or employee thereof shall be bound by the technical rules of evidence, and no informality in  
21 any proceeding or *in the manner of taking of testimony* shall invalidate any order, decision,  
22 rule, or regulation made, approved, or confirmed by the Commission.” *See* A.A.C. R14-3-  
23 109(K) (emphases added).

24 In light of the relaxed evidentiary and procedural rules governing administrative  
25 hearings in this state, and because telephonic testimony does not jeopardize the fundamental  
26 fairness underlying these proceedings, this Tribunal has repeatedly recognized and approved

1 the use of telephonic testimony in its administrative hearings to introduce probative evidence.  
2 *See, e.g., In the matter of Theodore J. Hogan and Associates, et al.,* Docket No. S-20714A-  
3 09-0553, *In the matter of Edward A. Purvis, et al.,* Docket No. S-20482A-06-0631; *In the*  
4 *matter of Yucatan Resorts, Inc., et al.,* Docket No. S-03539A-03-0000; *In the matter of Forex*  
5 *Investment Services Corporation et al.,* Docket No. S-03177A-98-0000. Therefore,  
6 permitting the above witnesses to testify by telephone is consistent with the rules and  
7 customary practice in administrative hearings before the Commission.

### 8 CONCLUSION

9 Permitting the witnesses identified above to testify telephonically at the upcoming  
10 administrative hearing allows the Division to present relevant witness evidence that is  
11 expected to be reliable and probative, is fundamentally fair, and does not compromise  
12 Respondents' due process rights. Therefore, the Division respectfully requests that its motion  
13 for leave to present such telephonic testimony be granted.

14 RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of January, 2017.

15 ARIZONA CORPORATION COMMISSION

16  
17 By   
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19 Attorney for the Securities Division  
20 Arizona Corporation Commission  
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1 On this 17th day of January, 2017, the foregoing document was filed with Docket Control  
2 as a Securities Division Motion – Miscellaneous, and copies of the foregoing were mailed  
3 on behalf of the Securities Division to the following who have not consented to email  
4 service. On this date or as soon as possible thereafter, the Commission's eDocket program  
5 will automatically email a link to the foregoing to the following who have consented to  
6 email service. On this date, an e-mail was also sent by the undersigned to any of the  
7 following who have consented to email service.

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